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Indian Water Rights: A State Perspective after *Akin*

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Indian Water Rights: A State Perspective After *Akin*[1]

The issue of Indian water rights has received very thorough and scholarly attention over the past two decades[2] and it would be presumptuous to think that one could, at this late date, provide some heretofore undiscovered legal insight into the issue. A more realistic and beneficial goal would be to achieve a better understanding of the relative positions of the major stakeholders in this

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1. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) [hereinafter referred to as *Akin*].
2. *See generally* NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 473-483 (1973); F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (National Water Commission 1971); WESTERN STATES WATER COUNCIL, REPORT ON INDIAN WATER RIGHT CASES IN THE ELEVEN WESTERN STATES (1976) (on file at the Western State Water Council, Salt Lake City, Utah); Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MTN. MINERAL L. INST. 669 (1971); Carver, *The Implied Reservation Doctrine: Policy or Law*, 6 LAND & WATER L. REV. 117 (1970); Clyde, *Indian Water Rights*, in 2 WATERS AND WATER RIGHTS 377 (R. Clark ed. 1967); Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237 (1975); Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MTN. MINERAL L. INST. 579 (1971); Dellwo, *Indian Water Rights—The Winters Doctrine Updated*, 6 GONZ. L. REV. 215 (1971); Leaphart, *Sale and Lease of Indian Water Rights*, 33 MONT. L. REV. 266 (1972); Moses, *The Federal Reserved Rights Doctrine—From 1866 through* Eagle County, 8 NAT. RESOURCES LAW. 221 (1975); Ranquist, *The Effect of Changes in Place and Nature of Use of Indian Rights to Water Reserved Under the "Winters Doctrine,"* 5 NAT. RESOURCES LAW. 34 (1972); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MINERAL L. INST. 631 (1971); Veeder, *Indian Prior and Paramount Rights Versus State Rights*, 51 N.D. L. REV. 107 (1974); Veeder, *Winters Doctrine Rights—Keystone of National Programs for Western Land and Water Conservation and Utilization*, 26 MONT. L. REV. 149 (1965); Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974); Comment, *Application of the* Winters *Doctrine: Quantification of the Madison Formation*, 21 S.D. L. REV. 144 (1976); Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West*, 1973 UTAH L. REV. 43 (1973).

controversy. It is with that objective in mind that the state perspective is presented.[3]

I. WESTERN WATER LAW

In order fully to appreciate the state perspective with respect to the question of Indian water rights, it is essential to understand the fundamental elements of the prior appropriation system.[4] Under the appropriation system, the water supply has the attributes of a public as well as a private resource. While the water flowing within state borders is deemed to be the property of the state,[5] private rights can be acquired by the actual beneficial use of a measurable and, usually, a diverted quantity. The appropriation right is not dependent upon land ownership and is forfeited by nonuse—the supply reverting to the public or senior appropriators.[6]

The prior appropriation doctrine is said to have evolved during the gold rush days in the west when placer miners first employed a priority system for determining the ownership of mining claims.[7] Under the system, the first to locate a mining claim and use the water incident to working that claim gained a prior right which would be protected against the later claims of others. Hence, the well-worn phrase "first in time is first in right" has been said to express the essence of the appropriation system.

The federal government first gave formal recognition to the appropriation system through the passage of the Mining Act of 1866.[8] Under that Act the federal government acknowledged the local customs and laws governing the possession and right to use water which had arisen on the federal public lands and confirmed water rights granted thereunder.[9] In 1870, Congress clarified the Mining Act of 1866 with an amendment[10] which provided that

3. The views presented herein do not necessarily represent the views of the State of Wyoming.
4. That doctrine, or a hybrid thereof, has been adopted by the 17 "Western" states: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.
5. *See, e.g.*, WYO. CONST. art. 8, § 1.
6. Two classic cases on the development of western water law are Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882), and Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886). *See also* 1 S. WEIL, WATER RIGHTS IN THE WESTERN STATES 118-84 (3d ed. 1911).
7. Irwin v. Phillips, 5 Cal. 140 (1855).
8. Mining Act of 1866, ch. 262, 14 Stat. 251.
9. *Id.*
10. Act of July 9, 1870, ch. 235, 16 Stat. 217 (amending Mining Act of 1866, ch. 262, 14 Stat. 251).

"all patents granted, or pre-emption or homestead allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [Act of 1866]."[11]

Seven years later, Congress passed the Desert Land Act of 1877,[12] which further strengthened the belief of the Western states that the appropriation system controlled the apportionment of waters within their respective borders.[13] That act provided that water rights on tracts of desert land should

> depend upon bona fide prior appropriation: . . . and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.[14]

Based upon the early acquiescence of the federal government in the authority of the Western states to control the use of water within their respective borders, each of the Western states developed elaborate systems for determining the nature and extent of appropriation rights as well as administering the manner of their use.[15] In addition, it is not uncommon to find expressions of state ownership of all the waters flowing within state boundaries in the respective constitutions of the Western states[16] as well as constitutional declarations sanctioning the appropriation doctrine.[17]

Using the appropriation system, homesteaders and pioneers seeking to settle the West appropriated the waters within the states and territories for irrigation and other purposes. Many of those appropriations have been consistently applied to beneficial uses since the late 1800's, and it is not unusual to find streams within the Western states which were fully appropriated prior to the turn

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11. *Id.*
12. Desert Land Act of 1877, ch. 107, 19 Stat. 377.
13. The false sense of security was heightened by the United States Supreme Court decision in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 160-63 (1935). *Portland Cement* had been thought to interpret the Desert Land Act as leaving to the Western states the authority to determine how rights to water would be acquired within their boundaries.
14. Desert Land Act of 1877, ch. 107, 19 Stat. 377.
15. For a fairly recent and concise synopsis of these laws, see A SUMMARY—DIGEST OF STATE WATER LAWS (R. Dewsnup & D. Jensen eds., National Water Commission 1973).
16. WYO. CONST. art. 8, § 1.
17. *E.g., id.* § 3; NEB. CONST. art. XV, § 6.

of the century. In view of the apparent early acquiescence of the federal government in the use of the appropriation doctrine and the long history of its application throughout the West, it should not be surprising to find that the states have expressed apprehension over the reserved rights doctrine, which creates a classification of water rights existing wholly independent of and inconsistent with state water law.

II. THE *WINTERS* DOCTRINE—ITS ORIGIN

The legal principles governing Indian water rights have been derived almost exclusively from judicial interpretation, beginning with the United States Supreme Court decision in the case of *Winters v. United States*.[18] In *Winters*, the United States brought an action in the federal district court in Montana on behalf of the Indian tribes on the Fort Belknap Indian Reservation. The United States sought to enjoin upstream non-Indian defendants from diverting waters necessary for irrigating pasture and farmland on the reservation. The government's theory was that there had been an implied reservation in an 1888 cession agreement between the tribes and the United States which retained for the Indians the right to use all of the waters of the Milk River flowing through the reservation. The non-Indian water users defended on the basis that they had acquired water rights under state law by diverting and applying water to beneficial use prior to any significant use of water on the reservation. Accordingly, the defendants claimed that, under the appropriation system and Montana law, they were prior appropriators with the superior right. The Court rejected the defendants' argument:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years. This was done May 1, 1888 [the date of the creation of the Fort Belknap Indian Reservation] . . . .[19]

The decision in *Winters* has served as the keystone supporting virtually all Indian water rights cases.[20] Since *Winters*, the reservation doctrine has evolved into the following:

> If the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for a federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that pur-

18. 207 U.S. 564 (1908).
19. *Id.* at 577 (citations omitted).
20. NATIONAL WATER COMMISSION, *supra* note 2, at 473.

> pose, then sufficient water to fulfill that purpose is reserved from appropriation by private users. The effect of the doctrine is twofold: (1) when the water is eventually put to use the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water.[21]

Unfortunately, such broad generalizations about the scope of reserved water rights do little to alleviate the impact of Indian water rights upon the water rights of non-Indian water users in the Western states. Because the doctrine was judicially created and continues to be defined by the courts, many critical issues concerning the nature and scope of these water rights remain undetermined.[22] These unresolved issues support the states' position that state court adjudication of *Winters* rights is both appropriate and absolutely necessary.

III. THE ABORIGINAL RIGHT THEORY

One of the more recent and perhaps more controversial issues surrounding the nature and extent of *Winters* water rights concerns the origin of those rights. One school of thought advocates the position that it was the Indians, not the federal government, who reserved rights to the use of water on the reservation.[23] The proponents of this "aboriginal rights" theory rely primarily upon *United States v. Winans*,[24] in which the United States Supreme Court held that the treaty establishing the Indian reservation for the Yakima tribe involved a grant to the federal government of those rights which the tribe had not reserved for itself, rather than a grant of rights from the federal government to the tribe. The staunchest advocate of this position, William Veeder,[25] relies upon the more recent decision in *United States v. Ahtanum Irrigation District*[26] in

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21. F. TRELEASE, *supra* note 2, at 109. *See also* Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).
22. *See* Ranquist, *The "Winters" Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639, 652 (citing 2 C. WHEATLEY, C. CORKER, T. STETSON, & D. REED, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 556-63 (1969)).
23. Dellwo, *supra* note 2, at 215; Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MINERAL L. INS. 631, 645-49 (1971).
24. 198 U.S. 371 (1905). *See also* United States v. Hibner, 27 F.2d 909, 911 (D. Idaho 1928).
25. Veeder, *supra* note 23.
26. 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *on*

which the Court of Appeals for the Ninth Circuit, citing *Winans*, stated that even before the Yakima Tribe had signed its treaty with the United States, "the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area."[27]

The aboriginal rights theory is not supported by the weight of case law and cannot be harmonized with rather clear judicial pronouncements without some strained interpretations of case law.[28]

In *Winters*, for example, the Supreme Court not only acknowledged the "power of the government to reserve waters,"[29] but it also held that the priority date of the water rights reserved for use on the Fort Belknap Reservation was to be the same date as the establishment of that reservation.[30] Establishment of the treaty date as the date of priority indicates that the Court determined that the implied water rights in *Winters* were granted to the tribes through the 1888 treaty agreement with the United States.[31] In *Arizona v. California*,[32] a modern Court restated the *Winters* holding:

> The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters v. United States* . . ., decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable. The Court rejected all of the arguments. As to whether water was intended to be reserved, . . . [t]he Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians *by reserving for them* the waters without which their lands would have

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remand, 330 F.2d 897, *rehearing denied*, 338 F.2d 307 (1964), *cert. denied*, 381 U.S. 964 (1965).

27. *Id.* at 326.

28. *See, e.g.*, Veeder, *Indian Prior and Paramount Rights Versus State Rights*, 51 N.D. L. REV. 107, 124-25, 128-30 (1974); Veeder, *supra* note 23, at 644-47. Veeder attempts to explain away the meaning of the Court's declaration in *Winters* that reserved rights were founded upon the federal government's superior power to reserve water for its use. Apparently, it is Veeder's contention that the Court, at that point, was merely addressing the question of whether water rights reserved by the Indians were later subject to divestiture upon the admission of Montana into the union. However, there is nothing in *Winters* to support such a narrow interpretation of the Court's language. *Id. See also* notes 19-20 and accompanying text *supra*.

29. 207 U.S. at 577.

30. *Id.* at 564.

31. *See* Warner, *Federal Reserved Water Rights and Their Relationship to Appropriative Rights in the Western States*, 15 ROCKY MTN. MINERAL L. INST. 399 (1970).

32. 373 U.S. 546 (1963).

> been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers* . . . . We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created.[33]

In addition to the straightforward language in both *Winters* and *Arizona v. California*, Justice Stewart's dissenting opinion in *Colorado River Water Conservation District v. United States*[34] (commonly known as *Akin*) stated that reserved rights were based upon "an intention formed at the time the federal land use was established to reserve a certain amount of water to support the federal reservations."[35] That view is also firmly supported by Professor Clark,[36] who states that

> the Winters case, as well as the other Indian cases, supports a number of propositions vital to the assertion of federal ownership of unappropriated, nonnavigable waters: . . . that, as the reliance on the Rio Grande dictum shows, the power of the federal government to make such reservations of water flows from the property clause rather than the treaty power; that implication clearly is buttressed by the Walker River case holding water to have been reserved albeit the reservation was created by proclamation.[37]

Aside from these flaws, at least one commentator has raised the possibility that the aboriginal rights theory will be detrimental to the water rights claims on non-treaty reservations.[38] In the face of the weight of case law and scholarly work, Mr. Veeder clings to the aboriginal theory by distinguishing "*Arizona v. California* Indian rights" from aboriginal rights—the former concept deriving from the ownership by the national government of the unappropriated rights to water on the public domain, the latter involving the immemorial rights of Indians based upon aboriginal Indian ownership of treaty lands.[39]

IV. THE SCOPE OF INDIAN WATER RIGHTS

Some treatises on Indian water rights have suggested that the source of the reservation of Indian water rights is irrelevant because the priority dates antedate those of virtually all non-Indian

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33. *Id.* at 599-600 (citations omitted) (emphasis added).
34. 424 U.S. 800 (1976).
35. *Id.* at 825.
36. 2 WATERS AND WATER RIGHTS § 102.4, at 59-61 (R. Clark ed. 1967).
37. *Id.* at 61. In United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939), the court recognized the reservation of waters for tribal use despite the fact that the reservation was created by executive action.
38. Ranquist, *supra* note 22, at 654.
39. Veeder, *supra* note 23, at 656. *Contra*, Bloom, *supra* note 2, *passim*.

appropriations.[40] However, as Dean Trelease has observed, "[t]he argument for paramount immemorial rights would, if accepted, permit any use of the streams under Indian ownership."[41]

Despite these novel theories concerning the nature and extent of Indian water rights, the courts have to date related the scope of those rights to the purposes for which Indian reservations were established. For example, in the latest decision of the United States Supreme Court concerning federal reserved rights, *Cappaert v. United States*,[42] the Court stated:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the *purposes for which the reservation was created.*[43]

Generally speaking, the intent to reserve waters is determined by the circumstances surrounding the creation of the Indian reservation, as well as the treaty agreements or other documents which established the reservation. In *Winters*, for example, the Court stated:

> The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless.[44]

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40. *See, e.g.*, Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237, 244 (1975).
41. F. TRELEASE, *supra* note 2, at 163. Presumably, Trelease's argument rests upon a theory that if Indian water rights were aboriginal in nature, they obviously would not be limited to the purposes for which the reservation was established. *See also* Dellwo, *supra* note 2.
42. 426 U.S. 128 (1976).
43. *Id.* at 139 (emphasis added).
44. 207 U.S. at 575-76. In Moore v. United States, 157 F.2d 760 (9th Cir. 1946), the court took note of the fishing habits of the Quillayute Indians in determining the government's intent to reserve lands and water sufficient to protect and expand that established industry of the tribe. *But see* Byers v. Wa-Wa-Ne, 86 Ore. 617, 638, 169 P. 121, 128 (1917). In *Byers* the court took a narrower view, concluding that where the lands in question did not require water to produce crops and where such irrigation as had taken place on the reservation had been sporadic and had involved small acreage "[w]e cannot find in the circumstances and conditions attending the negotiation of the In-

Since the extent of Indian water rights is dependent upon the purpose for which the reservation is established,[45] one critical factor is whether the right is limited to the original purposes for which the reservation was established or should be expanded to account for new uses on the reservation. This is one of the more troublesome questions concerning the *Winters* doctrine, the ultimate outcome of which will have the greatest impact on the quantity of water encompassed by Indian rights and their infringement upon vested appropriations of non-Indians.

Proponents of the Indian position advocate that the *Winters* rights should be expansive enough to take into account any future needs and uses for water on the reservation. A fundamental problem with such an approach to Indian water rights is that it ignores the basic justification for applying the doctrine—that the government intended to reserve sufficient water rights to meet a contemplated purpose.[46] Extending the doctrine to include uses not contemplated when the reservation was established thus conflicts with the rationale underlying the doctrine. Where the government has evidenced an intention to reserve water for use on withdrawn land, it is fair to attribute to the government the intention to provide water for reasonably foreseeable uses to facilitate the purpose of the reservation. However, it is not reasonable to conclude that sufficient water is reserved for any use which might reasonably be needed to fulfill the purposes of the reservation, regardless of the fact that the use was not contemplated at the time of the creation of the reservation. At least one court has used this rationale to limit the proprietary water rights claims of the United States,[47] and

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dian treaty of 1855 any suggestion that the waters of the Umatilla River were impliedly appropriated for the use of the Indians whenever they should see fit to avail themselves of these waters." *Id.* The court went on to grant the Indians rights only to water required for household use and for watering of livestock.

45. *See* Cappaert v. United States, 426 U.S. 128, 139 (1976).

46. The bulk of the decisions respecting Indian water rights have related the reservation of water to agricultural purposes. *E.g.*, Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States *ex rel.* Ray v. Hibner, 27 F.2d 909 (D. Idaho 1928); Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 79 P.2d 667 (1938); Merrill v. Bishop, 69 Wyo. 45, 237 P.2d 186 (1951).

47. Mimbres Valley Irr. Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977). *Mimbres* was a general adjudication of water rights in which the United States claimed minimum flows for recreational purposes within the Gila National Forest. The court held that the recreation and aesthetic uses of water within the national forest would not be given

there seems to be no logical justification for not applying the same rationale to Indian reserved water rights.

Another issue concerning the scope of Indian water rights is whether the right is limited by the quantum of water used at the time of the creation of the reservation or applied with reasonable diligence to beneficial use. Indian advocates argue that the right was meant to be open-ended to allow future development of the water.[48] That position was accepted in *United States v. Ahtanum Irrigation District.*[49] In discussing the question of the amount of water reserved by the Yakima Indians, the court noted that the reservation was not merely for present but for future use:

> The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil. . . . [T]his right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.[50]

Thus, in *Ahtanum*, the court ultimately decided that the quantum of waters reserved was not measured by the use being made at the time the treaty reservation was made. However, *Ahtanum* was basically a contract case, turning on the validity of an agreement for the distribution of waters made by the government on behalf of the Indians with certain non-Indian appropriators, and not an adjudication of Indian water rights.

Equally inconclusive are the decisions in *Winters* and *Conrad Investment Co. v. United States.*[51] Although the conclusion has been drawn that they point to an open-ended water right,[52] in both cases the court only required non-Indians to leave a specific amount of water in the stream for the use of the Indian reservation in an amount equal to that needed to meet the present uses of the Indians. Admittedly, the Court did retain jurisdiction over the decree so that if conditions on the reservation changed, the government could come in and seek additional water.

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priority dates equal to the date of creation of the reservation where those uses were not within the primary purposes for which the forest was established. *See also* WHITE, MASTER REFEREE REPORT U.S. CLAIMS WATER DIVISIONS 4-6 (Colo. 1976) (similarly defining the United States' proprietary claims).

48. *See, e.g.*, Dellwo, *supra* note 2; Veeder, *Winters Doctrine Rights—Keystone of National Programs for Western Land and Water Conservation and Utilization*, 26 MONT. L. REV. 149, 163 (1965).
49. 236 F.2d 321 (9th Cir. 1956).
50. *Id.* at 327.
51. 156 F. 123, 132 (C.C.D. Mont. 1907), *aff'd*, 161 F. 829 (9th Cir. 1908).
52. *See* United States v. Ahtanum Irr. Dist., 236 F.2d 321, 326-27 (9th Cir. 1956).

Another rather obvious problem with the open-ended approach to Indian water rights is that while it puts subsequent non-federal appropriators on notice that Indian water rights exist in a given source of water, their appropriations are threatened by an expanding water right which can continue to be exercised in ever-increasing amounts. This does nothing to remove the cloud upon vested non-Indian appropriations, nor does it provide the certainty necessary to allow planning and development of water-related activities by non-Indians.[53]

The special master and the Supreme Court recognized the deficiencies of an open-ended decree in *Arizona v. California*.[54] Specifically rejecting a proposal that he issue a decree "stating that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment," the special master noted that such an open-ended decree "would place all junior water rights in jeopardy of the uncertain and unknowable."[55] Ultimately the United States Supreme Court decided that the measure of the reserved Indian water right would be that amount necessary to satisfy the present and future needs of the Indians based upon a quantum measured by practicably irrigable acreage on the reservation.[56]

In *Arizona v. California*, the magnitude of the water rights created was determined by agriculture since that was the purpose for which the Indian reservations had been established.[57] Under different conditions courts have reserved waters for purposes other than, and in addition to, irrigation.[58] At least two noted legal scholars[59] have presumed, however, that the decision in *Arizona v. California*, adopting a standard of practicably irrigable acreage, "has

53. Myers, *The Colorado River*, 19 STAN. L. REV. 1, 70 (1966).
54. 373 U.S. 546 (1963).
55. S. RIFKIND, REPORT OF THE SPECIAL MASTER, ARIZONA v. CALIFORNIA 263-64 (1960) [hereinafter cited as REPORT OF THE SPECIAL MASTER].
56. In addition to the open-ended and irrigable acreage tests, under the holding in United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939), an additional test based upon present uses and needs has evolved. *See, e.g.*, Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299, 1313 (1974). In *Walker River*, the Court noted that the size of the tribe had not dramatically increased over a period of 70 years and the amount of water necessary for future uses was found to be measured by the present uses on the reservation. 104 F.2d at 340.
57. REPORT OF THE SPECIAL MASTER, *supra* note 55, at 265.
58. *See, e.g.*, Alaska Pac. Fisheries v. United States, 248 U.S. 78 (9th Cir. 1918); Kimball v. Callahan, 493 F.2d 493 (9th Cir. 1974).
59. Bloom, *supra* note 2, at 683; Moses, *supra* note 2, at 232.

settled once and for all the previously open question of the proper definition of the scope of such [*Winters*] rights."[60]

In view of the original intent of the federal government and the Indians at the time of creation of most Indian reservations that the Indians become a pastoral people,[61] this standard would appear to be the most reasonable means of quantifying Indian water rights in the majority of cases. Aside from the obvious benefit to holders of non-Indian rights of providing a specific quantum of water around which they could then plan, it is also a reasonable quantity upon which to sustain the economic viability of Indian reservations.[62] From the Indian standpoint, it has a definite advantage of not tying the quantum of water reserved to that which has already been applied to some beneficial use which, in view of the slow economic development of many Indian reservations, would produce a rather low quantity of water.[63]

Assuming that the "irrigable acreage" test has in fact become the accepted standard for measuring the nature and extent of an Indian water right, the next problem becomes that of finding an adequate definition of what is "irrigable." Edward Clyde points out some of the problems in defining this term:

> Land which would be susceptible of irrigation in 1888, when the reservation was reduced in size by agreement under the *Winters* case, is probably much less than the land within that same reservation, which would be susceptible of irrigation with today's available sources of energy and with today's pumps and sprinkling systems. Also, the land which is susceptible of irrigation today might be less than the amount which will be susceptible of irrigation at some future date, if energy becomes cheaper or our technology in pumping and sprinkling systems improves. Should the courts use the acreage susceptible of irrigation when the reservation was created, or at the time of the litigation, or speculate on the future?[64]

The decision in *Mimbres Valley Irrigation Co. v. Salopek*,[65] would appear to support a definition of irrigable acreage based upon the susceptibility of the land to irrigation at the time the reservation was created since that expresses the totality of what could have been contemplated at the time such waters were impliedly reserved.[66]

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60. Bloom, *supra* note 2, at 683.
61. *See, e.g.*, Winters v. United States, 207 U.S. 564, 576 (1908).
62. *See* Clyde, *supra* note 40, at 249-50.
63. *See, e.g.*, United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939).
64. Clyde, *supra* note 40, at 246.
65. 90 N.M. 410, 564 P.2d 615 (1977).
66. For a more detailed discussion of the issue of measuring irrigable acre-

V. OTHER UNANSWERED QUESTIONS

With the arrival of the energy crisis and the concomitant pressure for increased energy development in the West, it is not surprising that Indian water rights are frequently mentioned in connection with potential energy development on the reservation. Such purposes could not be used to define the measure of implied rights to the extent that such purposes were not within the contemplation of the federal government or the Indian tribes at the time of the creation of the Indian reservation.[67]

The greater question, however, is the extent to which changes in the use or place of use of Indian water rights can be made. These questions have not been definitively answered by the courts. One commentator argues:

> A reasonable approach would seem to be to determine the amount of water required for the irrigable acreage, and then permit the change of not only the place but also the type of use of that water under the normal guidelines for such changes—lack of injury to junior appropriators. This would permit the Indians to have the quantity of water intended to be reserved for them at the time the reservation was established, but give them the flexibility to use the water at such locations and for such purposes as they might determine for themselves.[68]

This commentator also argues that, under *United States v. Powers*,[69] the Supreme Court "held that white transferees of fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters from the Indian irrigation system. If Indians can alienate the land, and thereby alienate the water, they should be able to dispose of the water alone."[70] This analysis fails to take into account the fact that the purpose of the *Winters* doctrine was basically to facilitate the purposes of the reservation.[71]

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age, see Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 S. CAL. L. REV. 1, 26 (1960).

67. The special master found that other uses, such as industrial, which may consume substantially more water than agricultural uses, were not contemplated at the time the reservations in *Arizona v. California* were created. REPORT OF THE SPECIAL MASTER, *supra* note 55, at 265. *See generally* Cappaert v. United States, 426 U.S. 128, 141 (1976).
68. Moses, *supra* note 2, at 232.
69. 305 U.S. 527 (1939).
70. Moses, *supra* note 2, at 232.
71. Query whether, if the water were no longer necessary for the purpose for which the land was reserved, that water should not then again become a part of the stream system available for appropriation by others? The result would be analogous to the concept of abandonment under western water law, whereby water rights are lost to the stream

This interpretation would also expand significantly the uses which the doctrine authorizes, thus exacerbating the problems that the doctrine creates. An alternative approach has been suggested by Edward Clyde[72] who states that

> [f]irst, . . . the quantity of water and the sources from which it can be taken ought to be fixed by court decree. Then, if the place and nature of use are changed, the dominant position of the Indian water right, because of its priority, ought not to be transferable off the reservation. If the change to off-reservation uses will interfere with prior vested rights, the change ought to be subordinate to such rights.[73]

While this concept may appear reasonable in theory, its practicality to the tribes is impaired by the fact that, for the most part, Indian water rights have not been used and, therefore, no pattern of historic use has evolved.[74]

The special master in *Arizona v. California* did imply that changes in use were within the ambit of the *Winters* doctrine, noting that although the Indian water rights reserved for the five reservations were based on irrigation uses, "[t]his does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of changing the character of use is not before me."[75]

VI. SOURCE OF SUPPLY

In applying the *Winters* doctrine, the courts have held that the sources of reserved waters include waters arising upon, flowing through, or bordering Indian reservations.[76] Perhaps as a specter of things to come, at least one commentator has raised a parade of horribles relating to the source of supply of Indian water rights:

> If there are several streams or other water sources available to the Indian reservation, which collectively would exceed the Indians' needs, which of the sources, or how much water from each source,

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if beneficial use of the appropriation is discontinued. *See, e.g.*, Note, *A Survey of Colorado Water Law*, 47 DEN. L.J. 226, 277 (1970) (citing cases on abandonment).

72. Clyde, *supra* note 40, at 250.
73. *Id.*
74. Under normal guidelines, junior appropriators are entitled to maintenance of stream conditions as they existed at the time of their appropriations. *See, e.g.*, Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954). Applied to the typical Indian water rights situation, in which significant water usage has not yet occurred, this approach would severely restrict the profitability of transferring those rights.
75. REPORT OF THE SPECIAL MASTER, *supra* note 55, at 265.
76. Arizona v. California, 373 U.S. at 598.

> was impliedly reserved? May the Indians take all of the water from the streams where the cost of constructing facilities to divert the water is more favorable to them, even though by so doing they foreclose all non-Indian use of the waters of those particular streams? May they take the primary or firm flow of many streams and require the non-Indian users to expend money for storage of the high flow? If a particular stream, with reasonable expenditure, will yield to them all the water they need except in cases of extreme drought, are they entitled during periods of drought to go to streams which are not normally necessary to meet their needs?[77]

This is not to say, of course, that all waters arising upon an Indian reservation automatically make them subject to the *Winters* doctrine. In *United States v. Wightman*,[78] the rights of prior appropriators were held to be superior to Indian claims to several springs which flowed through the reservation. The springs arose upon lands which had been transferred from military use to the reservation. The court reasoned that the particular waters were not "necessary to the objects for which the reservation was created,"[79] and that the Indians' needs could be satisfied out of other sources. Finally, the court noted that *Winters* "is not an authority that the mere creation [of the reservation] reserves to the Indians, or to the United States for their benefit, the beneficial use of all waters flowing within the reservation."[80]

In contrast to the limitations on supply suggested by *Wightman*, at least one group of Indians has laid claim to

> all waters, including those on the surface and underground, occurring on, arising upon, passing through, or bordering upon the Wind River Indian Reservation, Wyoming; all water that may now or in the future be artificially augmented or created by weather modification, by desalination or presently unusable water supplies, by production of water supplies as a byproduct of geothermal power development, or by any other scientific or other type of means within the Wind River Reservation, Wyoming.[81]

In response to such broad claims to water and in order to alleviate the uncertainty surrounding the impact of *Winters* rights, the adjudication of those rights[82] should include an accounting for the

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77. Clyde, *Indian Water Rights*, in 2 WATERS AND WATER RIGHTS, 373, 392 (R. Clark ed. 1967).
78. 230 F. 277 (D. Ariz. 1916).
79. *Id.* at 282.
80. *Id.* at 283.
81. Joint Resolution, Shoshone and Arapahoe Tribes, Fort Washakie, Wyoming, Resolution No. 3360 (Dec. 27, 1973). *See also* Veeder, *supra* note 23, at 658.
82. See § VIII of text *infra* (discussing the adjudication of Indian water rights).

amount of water to be drawn from each potential source of supply.[83]

Another question of major concern to the states is the effect of the reserved rights doctrine upon interstate streams. In the West, most interstate streams have been apportioned under the doctrine of equitable apportionment[84] or the waters have been allocated under an interstate compact.[85] In either event, once the waters of the interstate stream have been apportioned among two or more states, the issue of allocating sufficient water to supply reservation water rights surfaces.

In *Arizona v. California*, the claims of the United States made on behalf of the Indians were satisfied out of the share allocated to each state within which the reservation was located.[86] Where the waters are subject to an interstate compact, Indian water rights are often exempted from the purview of the compact,[87] leaving unsettled the portion of water to be taken from each state in order to supply Indian water rights. In *United States v. Nevada*,[88] the United States Supreme Court intimated that to the extent necessary, the reserved right may be satisfied out of the allocations of both states.[89] In the absence of agreement among the states as to the quantities to be deducted from their respective allocations, the unfortunate but likely result would be that an apportionment would be made in the first instance by the United States Supreme Court.[90]

VII. THE NECESSITY FOR STATE ADJUDICATION OF INDIAN WATER RIGHTS

Despite the uncertainties that exist with respect to the nature and extent of Indian water rights it is reasonably certain that when they are finally adjudicated, the quantity reserved will be large and will constitute a "threat" to existing uses of water and create serious uncertainty which will affect the development of even unappropriated streams.[91] The uncertainty surrounding *Winters* rights re-

83. *See* Note, *supra* note 56, at 1319.
84. *See* Nebraska v. Wyoming, 325 U.S. 589 (1945); Kansas v. Colorado, 206 U.S. 46 (1907).
85. *See, e.g.*, Yellowstone River Compact, WYO. STAT. § 41-511 (1957).
86. 373 U.S. at 601.
87. *E.g.*, Colorado River Compact, WYO. STAT. § 41-505, art. VII (1957); Yellowstone River Compact, WYO. STAT. § 41-511, art. VI (1957).
88. 412 U.S. 534 (1973).
89. *Id.* at 539.
90. U.S. CONST. art. III, § 2.
91. F. TRELEASE, *supra* note 2, at 166-67.

sults in part because of the unanswered questions concerning the scope of the right and in part because the doctrine represents only legal claims to water rather than established uses on most Indian reservations. The full quantity of water required to satisfy the rights and the timing of the exercise of those rights remains unknown and poses an ever-present threat to non-Indian appropriations.[92]

The economies of the semi-arid West thrive or perish based upon the availability of water. While the West was developing, there was no intimation that the water supplies upon which these economies have become dependent were in jeopardy because of the *Winters* doctrine. On the contrary, during the fifty years which elapsed between *Winters* and *Arizona v. California* "the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands."[93] For these reasons, *Arizona v. California* and its progeny of bold and broad claims to reserved water rights[94] have had a tremendous impact on the Western United States. As one study has noted,

> [t]he result has been apprehension in the western public land states that the doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under state law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.[95]

From the states' standpoint, there is an imperative need to inventory Indian water requirements and to adjudicate and quantify Indian rights so that their relationship to non-Indian rights can be established. Without a reasonable quantification, Indian water rights claims may become so expanded by conceptualistic thinking that a situation of chaos will be created in the appropriation system.

Compounding the controversy over federal reserved rights is the difficulty encountered by state water authorities in coordinating Indian water rights claims with state water law administration and the uncertainty surrounding the ability of the states to bring a lawsuit against the federal government for the purpose of adjudicating these claims. Each of the Western states has a system for the administration of the use of water within its boundaries.[96] Those de-

92. Clyde, *supra* note 40, at 245; Myers, *supra* note 53, at 70-71.
93. NATIONAL WATER COMMISSION, *supra* note 2, at 474.
94. Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MINERAL L. INST. 743 (1975); Veeder, *supra* note 28, at 107.
95. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LANDS 144 (1970).
96. A SUMMARY—DIGEST OF STATE WATER LAWS, *supra* note 15, at 11-26.

siring to use water apply to the state through the system and the state then apportions the available waters among the applicants in some equitable manner. Indian water rights, on the other hand, are created outside of the system of state law and exist independently of that system.[97] This poses a major hurdle for those water users who wish to alleviate some of the uncertainty by obtaining the quantification of Indian water rights.

Since, under the doctrine of sovereign immunity, neither the federal government nor the tribes can be sued without their consent, any attempt to obtain an adjudication of reserved rights prior to 1952 was futile.[98] In 1952, Congress removed one of the bars to litigation through the passage of a general waiver of sovereign immunity in the area of water rights, commonly known as the McCarran Amendment.[99] The McCarran Amendment provided:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.[100]

Soon after its passage, certain court decisions limited the scope of the amendment. In *Miller v. Jennings*[101] five plaintiffs and their water district, claiming to represent a class of about ninety, sued the federal government, local government officials, another water district, and eleven individual defendants who were alleged to represent more than one thousand others similarly situated. An order of dismissal was affirmed on the grounds that the waiver in the McCarran Amendment covered only a proceeding in which all persons who have rights are before the tribunal.[102] Similarly, in *Dugan v. Rank*,[103] the Court held that the "suit" requirements of the McCarran Amendment were not met by a private suit to determine the rights of some, but not all of the water users along a river as against

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97. NATIONAL WATER COMMISSION, *supra* note 2, at 473.
98. Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 79 P.2d 667 (1938).
99. 43 U.S.C. § 666 (1970). This statute was enacted in 1952 as a rider to the appropriations act for the Justice Department. Department of Justice Appropriations Act of 1953, ch. 651, § 208(a) to (c), 66 Stat. 549, 560.
100. 43 U.S.C. § 666 (1970).
101. 243 F.2d 157 (5th Cir.), *cert. denied*, 355 U.S. 827 (1957).
102. *Id.* at 159.
103. 372 U.S. 609 (1963).

the United States.[104] Finally, in *Rank v. (Krug) United States*,[105] the waiver of sovereign immunity under the McCarran Amendment was restricted to exclude proceedings which are exclusively administrative in nature.

These early cases appeared to limit the utility of the McCarran Amendment to the states. However, during the 1970's a series of decisions by the United States Supreme Court have more clearly defined the scope of the McCarran Amendment, thus paving the way for state court adjudications of Indian water rights. In *United States v. District Court for Eagle County*,[106] the Supreme Court held that the holding of *Dugan v. Rank* was not to be applied in an overly technical manner. The federal government, resisting joinder in a Colorado adjudication, argued that the proceeding was not a general adjudication under *Dugan v. Rank* since those claimants whose rights had been decreed in prior adjudications were not before the court. The Court rejected the position of the government as "extremely technical."[107] The Court agreed that the absence of some claimants under prior decrees could present some problems if a conflict developed between their rights and the federal rights involved, but held that this factor was insufficient to obviate the necessity of federal presence as a party to a supplemental adjudication.[108] Additionally, the Court ruled that reserved rights of the United States are included in the phrase "where . . . the United States is the owner of . . . water rights by appropriation under State law, by purchase, by exchange, or otherwise,"[109] and the Court intimated that the reserved rights of Indians were also within the purview of the Act.[110]

In a companion case to *Eagle County, United States v. District Court ex rel. Water Division No. 5*,[111] the Court granted approval to joinder of the United States under the new Colorado water adjudication act[112] through which water rights were adjudicated on a month-by-month basis. Thus, the term "general adjudication"

104. These cases appear to accord with the legislative history of the statute which indicates that the waiver was designed to allow participation of the United States in *general adjudications* in which all of the rights of various owners on a given stream are to be determined. S. REP. No. 755, 82d Cong., 1st Sess. 9-10 (1951).
105. 142 F. Supp. 1, 74 (S.D. Cal. 1956).
106. 401 U.S. 520 (1971).
107. *Id.* at 525.
108. *Id.* at 525-26.
109. *Id.* at 523.
110. *Id.*
111. 401 U.S. 527 (1971).
112. COLO. REV. STAT. §§ 37-92-101 to 602 (1973).

was more loosely construed in these cases than had previously been the case in the prior decisions.

In the final analysis, however, it was *Akin*[113] in which the applicability of the McCarran Amendment to Indian water rights was ultimately determined. *Akin* arose when the United States filed a suit in the United States District Court for the District of Colorado naming over one thousand defendants (water users on the streams involved) and seeking an adjudication of the federal reserved water rights held by Indian tribes and by the United States in its proprietary capacity. Several defendants then filed for an adjudication within the state water system and sought dismissal of the federal suit.

The United States Supreme Court dismissed the federal action, citing several factors which weighed in favor of state proceedings.[114] While the Court rejected the Colorado claimants' allegation that the McCarran Amendment made the state court the sole forum for water adjudications, the Court did say that the amendment gave state courts jurisdiction to determine Indian water rights. The Court noted "[n]ot only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions."[115] Citing from the Senate report on the McCarran Amendment, the Court observed further that:

> "In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts." Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction

113. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (*Akin*).

114. In *Akin* the Court noted that the policy behind the McCarran Amendment favored unified adjudications which were more available in state court, that only the complaint had been filed in the federal proceeding, that there were extensive state water rights involved in the litigation, that there was a great distance between the federal and state courts, and that the United States had previously participated in other state adjudications. *Id.* at 819-20.

115. *Id.* at 810.

> of the Amendment excluding those rights from its coverage would enervate the Amendment's objective.[116]

Armed with *Akin*, the states firmly believed that they had succeeded in their attempts to obtain the meaningful quantification of Indian reserved water rights within their long established state water resource systems. *Akin* seemed to end all doubts as to the intent of the McCarran Amendment to include all reserved rights within its purview so that the uncertainties, insecurities, and apprehensions surrounding the legal claims of reserved water rights could once and for all be settled. Unfortunately, that is not the case. Tribal attorneys, and in some instances Justice Department attorneys, at the behest of the Indians, are mounting a new attack by which they seek to obstruct state quantifications.

The first prong of attack is based upon disclaimer provisions found in at least nine Western state constitutions.[117] The Wyoming Constitution typifies this disclaimer language and provides:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .[118]

In *Organized Village of Kake v. Egan*,[119] the United States Supreme Court addressed the effect of similar disclaimer language. *Kake* involved a dispute over Alaska's jurisdiction over the Thlinget Indians, who were claiming the right to trap salmon without state regulation. Reviewing the provisions of the disclaimer clause, the Court found that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction,"[120] and that the sole purpose of the disclaimer clause was to renounce any proprietary ownership by the state of reservation lands and to give recognition of the jurisdiction of the United States over said lands.[121] Finally, the Court held "that the words 'absolute jurisdiction and control' are not intended to oust the State completely from regulation of Indian 'property

116. *Id.* at 810-11 (quoting S. REP. No. 755, 82d Cong., 1st Sess., pt. 1, at 4-5 (1951)).
117. Arizona, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming.
118. WYO. CONST. art. 21, § 26.
119. 369 U.S. 60 (1962).
120. *Id.* at 68.
121. *Id.* at 60.

(including fishing rights).' "[122] Under the holding in *Kake*, the states would lack jurisdiction over the tribes only to the extent that they were seeking to exercise a proprietary rather than a governmental interest over the rights of Indian tribes.

However, in *McClanahan v. Arizona State Tax Commission*,[123] the Court narrowed the breadth of the *Kake* decision stating that the *Kake* "holding came in the context of a decision concerning the fishing rights of *non-reservation* Indians. . . . It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians."[124] The implication of *McClanahan* is that while disclaimer provisions may not preclude state jurisdiction, other factors must be analyzed to assess the validity of state jurisdiction over Indian tribes.

Using the factors enunciated by the United States Supreme Court in *McClanahan*, at least two bases for the exercise of state jurisdiction over Indian water rights exist: (1) where Congress has expressly delegated to the state or recognized in the state some power of government with respect to Indians; or (2) where a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of the state government, and where that state regulation does not infringe upon tribal self-government.[125] The McCarran Amendment is a clear expression of congressional intent to grant state jurisdiction over the adjudication of Indian water rights.[126] Moreover, the policy behind the McCarran Amendment and the very nature of Indian water rights claims and their interrelationship with non-Indian claims to water fully satisfies the second set of criteria. The water flowing through the reservation certainly provides the same source of water to satisfy non-Indian as well as Indian appropriations and, until those Indian water rights are determined, an adjudication of non-Indian rights would be meaningless. It is clear that the states have a sovereign interest in the regulation of the use of waters within their borders and, because of the interrelationship of Indian water rights claims with non-Indian water rights claims,[127] they also have the right to assert that jurisdiction over Indian water rights claims.

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122. *Id.* at 71.
123. 411 U.S. 164 (1973).
124. *Id.* at 176, n.15 (citations omitted).
125. *See also* F. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 117 (1942).
126. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (*Akin*). *Accord*, State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).
127. *Akin*, 424 U.S. at 810-11.

The second prong of the tribal attack on state jurisdiction relies upon the enactment of statutes such as Public Law 280[128] which, in the view of Indian advocates, supersede the granting of jurisdiction to the states under the McCarran Amendment.[129] That law provides, in pertinent part, that nothing contained in the Act, which provides a mechanism for the assertion of state jurisdiction on Indian reservations, "shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States] . . . ."[130] Tribal reliance upon that law appears to be ill-founded, however. As a statute granting general jurisdiction to the states, Public Law 280 did not supersede specific congressional grants of authority to the states over Indian affairs and, therefore, it is not a limitation on the special consent to state jurisdiction to adjudicate Indian water rights.[131]

The policy of the McCarran Amendment clearly recognized the necessity for adjudicating federal reserved rights claims, both Indian and non-Indian, in a state forum. Many of the problems created by reserved rights are encountered in coordinating the potentially vast but unquantified federal claims within state planning and administration. Federal policies abrogating compliance with state water laws and claiming paramount federal rights under the authority of the reserved rights doctrine impair this planning and development at the state level. As the Court pointed out in *Akin* in dismissing a federal action in favor of a state general adjudication,

> [i]ndeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals. . . .

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128. Pub. L. No. 280, ch. 505, § 4, 67 Stat. 588, 589 (1953) (codified at 28 U.S.C. § 1360 (1970)); *accord*, Pub. L. No. 90-284, tit. IV, §§ 401-402, 82 Stat. 73, 79 (1968) (codified at 25 U.S.C. §§ 1321-1323 (1970)).

129. *See, e.g.*, Ranquist, *supra* note 22, at 702-06; Veeder, *supra* note 28, at 114.

130. 28 U.S.C. § 1360(b) (1970); 25 U.S.C. § 1322(b) (1970) (same language). *See* note 128 *supra*.

131. *Akin*, 424 U.S. at 811-12 n.20. In State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976), the New Mexico Supreme Court was called upon to decide whether the disclaimer language found in the New Mexico Constitution would prohibit the State of New Mexico from adjudicating Indian water rights in the state court pursuant to the McCarran Amendment. The Supreme Court of New Mexico held that

> Additionally, the responsibility of managing the State's waters, to the end that they be allocated in accordance with adjudicated water rights, is given to the State Engineer.[132]

It is the states' position that *Akin* is not only determinative of the issue of state jurisdiction over the adjudication of Indian water rights claims, but should set the tone for the federal government and its beneficiaries, the Indian tribes, to remove the uncertainty and insecurity created by Indian water rights claims, and to cooperate with state court adjudications. Participation by the tribes independently or through the federal government[133] within the state water adjudication systems is the most straightforward legal procedure available for the resolution of Indian water rights claims and would settle conclusively many of the uncertainties discussed above. Once the scope of the Indian rights is adequately defined and integrated into the states' water systems, those rights will be protected by the states, and this will facilitate the orderly planning and development of water resources by Indians and non-Indians alike.[134] Non-Indian water users have endured the uncertainty caused by the amorphous nature of Indian water right claims long enough. The disruption which these claims generate in their unquantified form mandates their prompt adjudication within state water rights systems.

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the disclaimer provision was irrelevant because (1) the state was not asserting a proprietary interest in Indian lands, and (2) the states could exercise power over the Indians if the federal government had specifically granted that authority. In answering the claims of the United States that Public Law 280 superseded the McCarran Amendment, the court noted

> Public Law 280 is irrelevant to the present controversy for two reasons. First, New Mexico was not granted, nor has it assumed general civil and criminal jurisdiction over Indian reservations located within the state. Second, Public Law 280 did not repeal or affect in any way the McCarran Amendment, which granted to all states jurisdiction to adjudicate federally reserved water rights, including those reserved for Indians.

88 N.M. at 638, 545 P.2d at 1016 (court referred to 25 U.S.C. §§ 1321-1323 (1970) as Public Law 280, *see* note 128 *supra*). It is interesting to note that *Reynolds* was decided just one month prior to the United States Supreme Court decision granting state jurisdiction in *Akin* upon grounds similar to those relied upon by the New Mexico Supreme Court in *Reynolds*.

132. 424 U.S. at 819-20 (citations omitted).

133. The tribes have, on occasion, successfully argued that the federal government cannot adequately represent them due to an impermissible conflict of interest between the proprietary claims of the government and those of the tribes. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976). *But see* United States v. Truckee-Carson Irr. Dist., No. R-1987-JBA (D. Nev. Dec. 8, 1977).

134. Bloom, *supra* note 2, at 693.